Re Datuk Loh Fook Yen; ex parte Perwira Affin Bank (formerly known as Perwira Habib Bank Malaysia Bhd)

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO 29–35 OF 1998
SURIYADI J
5 JULY 2002

Bankruptcy *— Notice — Setting aside — Filing of affidavit to set aside bankruptcy notice — Grounds to set aside based on judgment debtor's cross-demand against judgment creditor — Whether necessary for cross-demand to be filed in court first — Whether sufficient evidence to substantiate cross-demand*

This was the judgment debtor's ('JD') appeal in relation to the dismissal of his application to set aside a bankruptcy notice, which had been served on him. The JD, in his affidavit ('the intimation-connected affidavit'), had alleged that he had a cross-demand for loses sustained as a result of a wrongful petition of a creditor's petition against him in another bankruptcy suit.

Held, dismissing the appeal:

(1) To succeed in setting aside a bankruptcy notice, the JD must satisfy the court that he had a counterclaim, set-off or cross-demand that equalled or exceeded the judgment debt (see p 271D–E).

(2) Pursuant to r 95(1) of the Bankruptcy Rules 1969 ('the Rules'), the filing of an intimation-connected affidavit operated as an application to set aside the impugned bankruptcy notice, hence the dispensation of a summons. It was incumbent upon the JD, when filing the intimation-connected affidavit, to meticulously show the existence of a counterclaim, set-off or cross-demand, which equalled or exceeded the amount of the judgment debt and which the debtor could not have set up in the action in which the judgment or order was obtained (see pp 270F, I–271A).

(3) In the instant case, the cross-demand had not been satisfactorily proved, not because there was no pending case filed that equalled or exceeded the amount of the judment debt, but because there was insufficient evidence to substantiate it. Further, there was no reasonable probability of success on the part of the JD founded on a cross-demand, as there was insufficient evidence to prove any supposed financial loss, which could equal or exceed the judgment sum (see pp 273H–274A).

[Bahasa Malaysia summary

Ini adalah rayuan penghutang penghakiman ('PP') berhubung kepada pembatalan permohonannya untuk mengenepikan notis kebankrapan, yang telah diberi kepadanya. PP, dalam afidavitnya ('afidavit yang berhubung secara rapat'), telah mengatakan bahawa

A dia mempunyai tuntutan balas bagi kerugian yang dialaminya sebagai hasil daripda petisyen yang salah oleh petisyen seorang sipiutang terhadapnya dalam satu suit kebankrapan yang lain.

Diputuskan, menolak rayuan tersebut:

B (1) Untuk berjaya mengenepikan satu notis kebankrapan, PP mesti memuaskan mahkamah bahawa dia mempunyai tuntutan balas, set-off ataupun tuntutan pemeriksaan yang sama ataupun melebihi hutang penghakiman (lihat ms 271D–E).

(2) Bersamaan dengan k 95(1) Peraturan Kebankrapan 1969
C ('Peraturan tersebut'), pemfailan afidavit yang berhubung secara rapat yang beroperasi sebagai permohonan untuk mengenepikan notis kebankrapan yang disoalkan, dan dispensasi saman. Adalah wajib bagi PP, apabila memfailkan afidavit berhubung rapat, untuk secara terperincinya menunjukkan kehadiran satu tuntutan balas, set off ataupun tuntutan pemeriksaan, yang sama ataupun
D melebihi hutang penghakiman dan yang mana penghutang tidak boleh mengatur semsa penghakiman atupun perintah diterima (lihat ms 270F, I–271A).

(3) Dalam kes ini, tuntutan pemeriksaan tidak dbuktikan secara sempurna, bukan kerana tiada kes kini yang difailam uang sama
E ataupun melebihi jumlah hutang penghkaiman, tetapi kerana tiada keterangan yang mencukupi untuk menyokongnya. Lagipun, tiada kemungkinan yang munasabah untuk berjaya bagi pihak PP yang didapati daripada tuntutan pemeriksaan, kerana keterangan yang tidak mencukupi untuk membuktikan kehilangan kewangan yang sama atau melebihi jumlah
F penghakiman (lihat ms 273H–274A).]

Notes

For cases on setting aside of notice, see 1 *Mallal's Digest* (4th Ed, 1998
G Reissue) paras 1766–1785.

Cases referred to

A Debtor, In re [1935] 1 Ch 347 (refd)

A Debtor (No 75 of 1982, Warrington), Re ; ex p the Debtor v National
H *Westminister Bank* [1983] 3 All ER 545 (refd)

A Debtor No 80 of 1957, In re [1958] 1 Ch 81 (refd)

Bankruptcy Notice, In re [1934] Ch 431 (refd)

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)

I *GEB, In re, a Debtor* [1903] 2 KB 340 (refd)

Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304 (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Bankruptcy Rules 1969 rr 94(1)(b), 95(1)

WM Lee (*Shook Lin & Bok*) for the respondent.
MS Murthi (*Murthi & Partners*) for the appellant.

Suriyadi J: This case before me which has a chequered history, shorn of all the unnecessary facts relates to an attempt by the judgment debtor to set aside a bankruptcy notice, which had been served on him. The judgment debtor in his affidavit ('the intimation-connected affidavit' or interchangeably as merely 'the affidavit') had alleged that he had a cross-demand for losses sustained as a result of a wrongful presentation of a creditor's petition against him in another bankruptcy suit. The current impugned bankruptcy notice was founded on a judgment going back all the way to 23 October 1987.

To succeed in setting aside a bankruptcy notice, a judgment debtor must without reservation satisfy the court that the conditions as listed under r 94(1)(b) of the Bankruptcy Rules 1969 have been complied with. The latter must prove that he has either:

(1) a counterclaim;

(2) a set-off; or

(3) a cross-demand.

which equals or exceeds the judgment debt. This burden which rests on the shoulders of the judgment debtor is certainly an onerous one (*Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304; *In re GEB, a Debtor* [1903] 2 KB 340; *In re Bankruptcy Notice* [1934] Ch 431; *In re A Debtor* [1935] 1 Ch 347).

Due to the special nature of the action under r 95(1), the filing of an intimation-connected affidavit would operate as an application to set aside the impugned bankruptcy notice, hence the dispensation of a summons (*Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298). After reading this provision, one then is catapulted back to r 94, in particular sub-r (1)(b). This provision reads:

> (1) Every bankruptcy notice shall be endorsed with —
> (a) ...
> (b) *an intimation* to the debtor that if he has any counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an *affidavit* to that effect with the Registrar. (Emphasis added.)
>
> (2) In the case of a notice served in the Federation the time shall be seven days ...

Subject to the above provision, it thus would be encumbent upon the judgment debtor when filing the intimation-connected affidavit in question,

to meticulously show the existence of a counterclaim, set-off or cross-demand which equalled or exceeded the amount of the judgment debt, and which the debtor could not have set up in the action in which the judgment or order was obtained. In the current case, even though the judgment debtor had affirmed his losses, but without the necessity of dwelling onto the details of the affidavit by me, what was strikingly clear was that nothing was mentioned whether the averment of counter-demand had been filed in court or not at the time of the filing of the affidavit. Everything became clearer when counsel for the judgment debtor admitted in open court that he had not done so, even up to the day of the hearing before me.

It must be emphasized that rr 94 and 95 of the Bankruptcy Rules 1969 are intertwined with s 3(1)(i) of the Banking Act 1967, and thus must be read together. For completeness I herewith supply the relevant portion of the latter provision. It reads:

> A debtor commits an act of bankruptcy in each of the following cases:
>
> (i) if a creditor has obtained a final judgment ... against him ... has served on him ... a bankruptcy notice ... and he does not within seven days after service ... either comply with the requirements of the notice or *satisfy the court* that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt ... and which he could not set up in the action in which the judgment was obtained ...

The common factor in those provisions is that, a judgment debtor may successfully defeat a bankruptcy notice by declaring in an affidavit that he has a counterclaim, set-off or cross-demand, which exceeds or equals the amount of the judgment. What is unclear in the above provisions is whether before alluding to those averments in the intimation-connected affidavit, they must be filed first into court or otherwise. If the answer is in the positive, then the judgment debtor cannot depend on them to extricate himself out of his precarious predicament.

Before arriving at any conclusion, it would be timely and necessary for me to set out some of the relevant references adverted to by me. In the *Dictionary of Law* by PH Collin, 'counterclaim' is defined as:

> ... claim in a court by a defendant against the plaintiff who has already brought in a claim against him.

In *Black's Law Dictionary* (6th Ed):

(i) 'counterclaim' is authored as:

> A claim *presented* by a defendant in opposition to or deduction from the claim of the plaintiff ... If established, such will defeat or diminish the claim of the plaintiff's claim.

(ii) 'cross-claim' is defined as:

> Cross-claims against co-parties are *governed* in the federal district courts and in most state trial courts *by Rule of Civil Procedure* ...
> *Counterclaim distinguished.* 'Cross claims' are *litigated* by parties on the same side of the main litigation, while *'counterclaims' are litigated* between opposing parties to the principal action.

(iii) 'set-off' is defined as:

> 'A *claim filed* by a defendant against the plaintiff when sued and in which he seeks to cancel the amount due from him or to recover an amount in excess of the plaintiff's claim against him.'

In *re A Bankruptcy Notice* [1934] Ch 431 at p 437, Lord Hamworth MR had occasion to say:

> With regard to the word 'set-off', that is a word well-known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon are such that it is a sum which is proper to be dealt with as diminishing the claim which is made and against the sum so demanded can be set-off.

Williams and Muir Hunter on *Bankruptcy* (19th Ed) had also opined at p 37 that the registrar:

> ... must consider whether in the light of the evidence adduced by either side, there is a genuine triable case of set-off, etc ... which is *presently enforceable by action* and not merely a claim which *might* be the subject of a set-off in the bankruptcy ... .(Emphasis added.)

(iv) Cross-demand is defined as:

> 'Where a person against whom a demand is made by another, in his turn makes a demand against that other, these mutual demands are called 'cross-demands'. A set-off is a familiar example. See also 'counterclaim; cross-claim; cross complaint.'

Warner J in *Re a Debtor (No 75 of 1982, Warrington) ex parte the Debtor v National Westminster Bank* [1983] 3 All ER 545 at p 553 had remarked:

> First, the affidavit or affidavits must show that he has a cross-demand against the creditor which is *genuine*. To satisfy that requirement, the cross-demand must be put forward in *good faith*, and must have a *reasonable probability of success*, or as it has also been expressed, *must give rise to a triable issue* ... . (Emphasis added.)

In the abovementioned case of *In re a Debtor No 80 of 1957* [1958] 1 Ch 81 at p 90, Jenkins LJ after a thorough discussion of the word 'cross-demand' had said:

> From these authorities upon the relevant provision of the Bankruptcy Act it appears that a 'cross-demand' is a term of wide import *extending to matters which would not be covered by* the expressions 'counterclaim' or 'set-off ... . (Emphasis added.)

From the above definitions and views from case laws, even a cursory scrutiny will indicate that for all three averments to be effective, they must possess certain characteristics. Suffice for me to conclude at this juncture that cross-claims and set-offs may be lumped together whilst cross-demands are separated from them. For cross-claims and set-offs, apart from being genuine and capable of being substantiated, must also have been filed into court prior to the filing of the intimation-connected affidavit (see also *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304).

I have to bear in mind that under s 3 of the Bankruptcy Act, for a judgment debtor to succeed, the court must be *satisfied* of one of the averments (see the provision above). Notwithstanding the fact that the issues of counterclaim or set-off have not been ventilated by the judgment debtor, due to the peculiar lumping of the averments in the discussed provisions, I will not hesitate to refer to them for analogy and comparison purposes. Needless to say, after some soul-searching exercise, I was unable to appreciate an argument that would be based on mere assertions of counterclaims or set-offs without more, especially when no claims have been filed in any court in Malaysia. If filing of claims into court were not one of the criteria, it would not take much for any desperate judgment debtor to resort to unsavoury measures to avoid being declared bankrupt. Surely the *very filing* of these matters would be a very pertinent factor of consideration for the Registrar, as it would rebut any allegation of a flimsy attempt on the part of the judgment debtor to deny the judgment creditor of the fruits of his labour.

I have also to bear in mind that the judgment, which will be the premise of a particular bankruptcy notice, must invariably have been obtained way back before the serving of the latter notice. Surely, no reasonable person, who is faced with a judgment hanging over his head, would hesitate to file either a counterclaim or set-off in court if he genuinely has one. With the claim having been filed in court, not only will he be in better stead mentally and tactically, but also if successful, be able to cancel off or neutralize the effect of the judgment obtained by the judgment creditor. I could only conclude that apart from ignorance and financial constraints, the unwillingness by a judgment debtor to file and litigate his rights prior to the filing of the intimation-connected affidavit must be due to his awareness of the futility of filing an unsatisfactory counterclaim or set-off.

I must admit that due to the nature of the course of action and its stage here, let alone the terminology promulgated by Parliament, it has taken me sometime to decide whether in the circumstances of the case, for a demand to qualify as a cross-demand the judgment debtor must only serve an enforceable judgment or bankruptcy notice to the petitioner. Being mindful of the views of Jenkins LJ in *In re A Debtor No 80 of 1957*, in that the scope of a cross-demand is fairly wide, I conclude that a cross-demand yet to be filed in court would qualify. That being so, an enforceable judgment or bankruptcy notice is not a precondition to qualify as a cross-demand here. If I may attempt a more helpful definition, in a cross-demand, a judgment or bankruptcy notice would be included within its ambit, regardless of them having been filed in court or not. On the other hand, as in the circumstances of the case, the non-filing of a cross-demand especially even up to this late stage, may attract an adverse inference. In the current case, I am unable to conclude that the cross-demand had been satisfactorily proved, not because there was no pending case that equalled or exceeded the amount of the judgment debt, but because there was insufficient evidence to substantiate it.

To summarize the evidence, I have to conclude that there was no reasonable probability of success on the part of the judgment debtor here

founded on a cross-demand, as there was insufficient evidence to prove any supposed financial loss, which could equal or exceed the sum of the judgment. The supposed losses suffered, due to the failure of the judgment debtor to accept the offer of the executive director's position, was his own making as he had rejected it on his free will. The adverse publicity, if any, was brought upon himself by his continuous refusal to pay. A

Based on all the above legal interpretations and finding of facts, I have no hesitation in rejecting the appeal of the judgment debtor with costs. B

Appeal dismissed.

Reported by Lim Lee Na C

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